



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2011

Mr. Paul Roser
Public Information Office
Humble Independent School District
P.O. Box 2000
Humble, Texas 77347-2000

OR2011-06095

Dear Mr. Roser:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 416340.

The Humble Independent School District (the "district") received a request for the following information: (1) the most recent agreement between the district and a named company, (2) the most recent proposal or response to a request for proposals submitted by the company to the district, (3) the most recent bids submitted by the company, (4) any documents, including correspondence between the company and the district, concerning a specified dispute between the district and the company, including information regarding a referral to the district attorney, (5) any document relating to the district's decision to employ or not employ the company, (6) documentation of campaign contributions by the company to members of the district's board of trustees, (7) records of employees being entertained by the company at a specified location, and (8) any conflict of interest form filed with the district naming the company. You state the district has provided some of the information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, rule 503 of the Texas Rules of Evidence, rule 192.5 of the Texas Rules of Civil Procedure, and rule 26(b)(3) of the Federal

Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note some of the information you have submitted is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed . . . investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(3) information in [a] . . . contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted engagement letter and completed investigation are expressly public under section 552.022(a). The district must release this information unless it is made confidential by other law. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10–11 (2002) (attorney work-product privilege under section 552.111 may be waived), 676 at 10–11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 are not other law that make information confidential for the purposes of section 552.022. In addition, the courts have not found the Federal Rules of Civil Procedure to be “other law” for the purposes of section 552.022. Therefore, the district may not withhold the engagement letter or the completed investigation under section 552.107 or section 552.111 of the Government Code or under rule 26(b)(3) of the Federal Rules of Civil Procedure. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the

¹ Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, rule 192.5 of the Texas Rules of Civil Procedure, and rule 26(b)(3) of the Federal Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1–2 (2002). Additionally, we note you also assert rule 193.3 of the Texas Rules of Civil Procedure and rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. However, you have not submitted any arguments explaining how these provisions apply to the submitted information. We therefore assume you have withdrawn your claim of these rules. *See* Gov't Code § 552.301, .302.

attorney-client privilege under Texas Rule of Evidence 503 and the attorney work-product privilege under Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 503 enacts the attorney-client privilege, providing in relevant part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information at issue was communicated with or created by the district's attorneys for the purpose of providing legal advice and recommendations to the district's

staff and board of trustees. You have identified the parties to the communications and state the information at issue was not intended to be disclosed to parties outside the attorney-client relationship, and it has remained confidential. Based on your representations and our review of the information at issue, we agree the engagement letter and completed investigation fall within the protections of the attorney-client privilege and may be withheld under Texas Rule of Evidence 503.²

Next, we turn to the remaining information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those discussed for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6–7 (2002). Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the remaining information was communicated with or created by the district's attorneys for the purpose of providing legal advice and recommendations to the district's staff and board of trustees. You have identified the parties to the communications and state the information at issue was not intended to be disclosed to parties outside the attorney-client relationship, and it has remained confidential. Based on these representations and our review, we agree the remaining information is subject to section 552.107(1). However, we note that one of the communications includes attached e-mails between non-privileged parties that are responsive to the request at issue. If these e-mails, which we have marked, exist separate and apart from the communication to which they are attached, then the district may not withhold the e-mails between the non-privileged parties under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov't Code § 552.111. Section 552.111 encompasses the attorney work-product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4–8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including

² As this ruling is dispositive, we do not address your arguments under the work-product privilege.

the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6–8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

Upon review of your arguments and the submitted information, we find the district has not demonstrated that the e-mails at issue were created or developed for trial or in anticipation of litigation by or for the district or the district's representative. We also note these e-mails were shared with a non-privileged party. Because these e-mails were shared with a non-privileged party, we find the attorney work-product privilege under section 552.111 has been waived. Accordingly, the district may not withhold these e-mails under section 552.111 of the Government Code.

You also argue the information is excepted pursuant to rule 26(b)(3) of the Federal Rules of Civil Procedure, which states:

(A) . . . Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But . . . those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

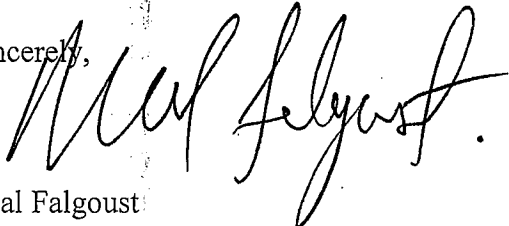
FED. R. CIV. P. 26(b)(3)(A). As previously mentioned, we find the district has not demonstrated the e-mails at issue were prepared in anticipation of litigation or for trial. Further, we find the e-mails have been shared with a non-privileged party, and, thus, the attorney work-product privilege has been waived. Accordingly, the district may not withhold this information under rule 26(b)(3) of the Federal Rules of Civil Procedure.

In summary, the district may withhold the engagement letter and the completed investigation under Texas Rule of Evidence 503. With the exception of any responsive non-privileged e-mails that exist separate and apart from the submitted communications, the district may withhold the remaining information under section 552.107(1) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/tf

Ref: ID# 416340

Enc. Submitted documents

c: Requestor
(w/o enclosures)